Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

KAREN MOORE, et al.,

Petitioners,

v.

HANNON FOOD SERVICE, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fair Labor Standards Act's regulations exempt executive, administrative and professional employees from the Act's minimum wage/maximum hours obligations so long as they are paid on a "salary basis," as defined in 29 C.F.R. § 541.118(a). Whether an employee is paid on a salary basis turns largely on whether the employee's pay is subject to impermissible deductions. Section 541.118(a)(6) provides a "window of correction," which permits employers, under some circumstances, to establish an employee's exempt status by repaying improperly deducted sums.

The Question Presented is whether the section 541.118(a)(6) window of correction is available to an employer which has a *policy and practice* of making impermissible deductions.

PARTIES

The petitioners are Karen Moore, Derrick K. Nichols, Shawnya Frank, George James, Eugene Page, Mary Ann Frye and Lisa A. Greene.

The respondents are Hannon Food Service, Inc., Hannon's Food Service, Inc., Hannon's Food Service of Jackson, Inc., and Hannon's Food Service of Natchez, Inc. All of the respondents are franchisees of KFC (formerly Kentucky Fried Chicken), which is not a party.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Karen Moore, et al., respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on January 20, 2003.

OPINIONS BELOW

The January 20, 2003, opinion of the Court of Appeals is reported at 317 F.3d 489 (5th Cir. 2003), and is set out at App. 1-16 of the Appendix. The February 18, 2003, order of the court of appeals denying rehearing, which is not officially reported, is set out at App. 33-34 of the Appendix. The September 28, 2001 decision of the district court, which is not officially reported, is set out at App. 17-32 of the Appendix.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on January 20, 2003. A timely petition for panel rehearing and rehearing en banc was denied on February 18, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(a).

STATUTE AND REGULATIONS INVOLVED

Section 13(a)(1) of the Fair Labor Standards Act, 29 U.S.C. § 213(a)(1), exempts from the protections of sections 6 and 7 of the Act "any employee employed in a bona fide executive, administrative, or professional capacity . . .

(as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor]. . . .)"

The regulations delineating the persons exempted from the FLSA are set out in 29 C.F.R. §§ 541.1 (executive employees), 541.2 (administrative employees) and 541.3 (professional employees). All three of these regulations generally require that the employee be paid on a "salary basis." 29 C.F.R. §§ 541.1(f), 541.2(e) and 541.3(e).[1]

The standards for determining whether an employee is paid on a salary basis are set forth in section 541.118 of the FLSA regulations. Section 541.118(a) provides as follows:

> (a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any work-week in which he performs no work.
>
> (1) An employee will not be considered to be "on a salary basis" if deductions from his

[1] Such employees may also have exempt status if they are paid on a fee basis. That aspect of the regulations is not at issue in this case.

predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly, if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.

(2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

(3) Deductions may also be made for absences of a day or more occasioned by sickness or disability (including industrial accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability. Thus, if the employer's particular plan, policy or practice provides compensation for such absences, deductions for absences of a day or longer because of sickness or disability may be made before an employee has qualified under such plan, policy or practice, and after he has exhausted his leave allowance thereunder. It is not required that the employee be paid any portion of his salary for such days or days for which he receives compensation for leave under such plan, policy or practice. Similarly, if the employer operates under a State sickness and disability insurance law, or a private sickness and disability insurance plan, deductions may be made for absences of a working day or longer if benefits are provided in accordance with the particular law or plan. In the case of an industrial accident, the

"salary basis" requirement will be met if the employee is compensated for loss of salary in accordance with the applicable compensation law or the plan adopted by the employer, provided the employer also has some plan, policy or practice of providing compensation for sickness and disability rather than that relating to industrial accidents.

(4) Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave. The employer may, however, offset any amounts received by an employee as jury or witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

(5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

(6) The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will

not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

STATEMENT OF THE CASE

The Petitioners are seven supervisors who worked at KFC franchises operated in Mississippi by the family-owned respondent companies ("Hannon"). They brought this action in the United States District Court for the Southern District of Mississippi, claiming that they had improperly been denied overtime compensation in violation of the Fair Labor Standards Act. As provided in Section 16, 29 U.S.C. § 216, they sought overtime payments, an additional equal amount in liquidated damages, plus counsel fees. During the relevant time period, Petitioners worked an average of about ten hours per week overtime for which they received no overtime pay at all.

The relevant facts are not in dispute. The Fair Labor Standards Act exempts from its coverage certain executive, administrative, and professional workers. The Secretary of Labor, as required by the FLSA, has issued regulations defining which employees are exempt from the Act's protections, including the right to overtime pay. To be exempt, those workers must be paid on a "salary basis" and perform duties classified as executive, administrative, or professional in nature.

The parties agreed that the Petitioners' job duties met the regulatory "duties" test. The Hannon Defendants admitted, however, that for a four month period from November 1997 to February 1998, they violated the Labor Department's regulations, known as the "no docking" rule, which prohibits pay deductions based on the quantity or quality of an employee's work. 29 C.F.R. § 541.118(a).

Hannon had an express policy of making impermissible deductions. The employer reduced the compensation paid to the supervisors in question by an amount equal to any cash shortfall in the cash registers at their stores. In this manner Hannon shifted the business risk of cash register shortages to its store front supervisors. (App. 2-3).

Hannon made seventeen such deductions from the pay of most but not all of the plaintiffs. Under the applicable regulations, moreover, a worker who is "subject to" such a deduction is not paid "on a salary basis," and thus falls outside the exemption, even if no deductions have in fact been made. *Auer v. Robbins*, 519 U.S. 452 (1997).

In September 2000, two and one half years after the improper deductions had been made, and only a week before the case was to go to trial, Hannon tendered to each of the employees from whom improper deductions had been made a payment equal to the amount of the earlier improper deduction. The deductions refunded totalled approximately $600.[2] Based on the parties' stipulation and evidentiary submissions to the district court, both parties requested judgment as a matter of law. Hannon asked the district court to dismiss the FLSA claims in light of the after-the-fact refunds. Hannon relied on the "window of correction" regulation, 29 C.F.R. § 541.118(6), which in some circumstances permits an employer, by refunding an improper deduction, to establish an exemption as though no violation had occurred.

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[2] The checks were for a total of $474.87 plus interest at 8% from the date on which the improper deductions had occurred.

The district court concluded that the window of correction was not available in this case because Hannon's deductions were not isolated events, but rather deductions taken as a matter of course based on an express policy. The District Court awarded summary judgment to the employees on the issue of liability. The district court ordered Hannon to pay the plaintiffs four months of overtime pay. (App. 3). The court denied the plaintiffs' request for an equal amount in liquidated damages, and refused to award overtime pay for the full two year statutory limitations period. The district court also awarded counsel fees, but deferred determination of the amount of that fee pending appellate proceedings.

Both parties appealed. The court of appeals concluded that the window of correction was indeed available to Hannon, and that the after-the-fact payment of less than $600 was therefore sufficient to avoid liability for the larger overtime compensation claim. The central issue on appeal was whether the window of correction can be invoked by an employer which has an express policy and actual practice of making deductions forbidden by the salary basis regulations. The Secretary of Labor has consistently interpreted the regulation to preclude such employers from invoking the window of correction. (App. 4). The Fifth Circuit, however, concluded that the Secretary's interpretation was inconsistent with the language of section 541.118(a)(6). (App. 12-15). The court of appeals noted that several other circuits had reached the contrary

result and that those decisions had expressly approved the Secretary's interpretation.[3] (App. 10-12).

On February 3, 2003, the plaintiffs filed a petition for rehearing and a suggestion for rehearing en banc. That motion was denied on February 18, 2003. (App. 33-34).

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS REJECTED THE SECRETARY OF LABOR'S LONGSTANDING INTERPRETATION OF THE WINDOW OF CORRECTION IN 29 C.F.R. § 541.118(a)(6)

The court of appeals in this case expressly rejected the Secretary of Labor's longstanding interpretation of a key Fair Labor Standard Act regulation.

Section 13(a)(1) denies most of the rights created by the FLSA to "any employee employed in a bona fide executive, administrative, or professional capacity." The Act open-endedly authorizes the Secretary to define those categories by regulation. Executive, administrative, or professional employees are not exempt unless they are paid on a "salary basis." See *Auer v. Robbins*, 519 U.S. 452, 456 (1997). The regulations further provide, with certain specific exceptions, that an employee is not paid on a salary basis if an employer subjects the employee to pay reductions because of the quality or quantity of work done.

[3] Because it ruled for the defendants on the issue of liability, the court of appeals did not reach the plaintiffs' cross-appeal on damages. (App. 4, 16 n.16).

29 C.F.R. § 541.118. If impermissible deductions are made, the worker is not exempt.

Notwithstanding the no-docking rule, the Secretary's regulation contains a limited savings provision known as the "window of correction." 29 C.F.R. § 421.118(a)(6). See *Auer v. Robbins*, 519 U.S. at 463-64 (1997). In certain circumstances an employer which has made an impermissible deduction may correct that action retroactively to establish the claimed exemption. To qualify for the regulatory dispensation, an employer must refund the amount improperly withheld and promise not repeat such improper deductions.

The scope of the window of correction is of great practical importance because an employer can wait until after it has been sued before it refunds the improper deduction. *Auer v. Robbins*, 519 U.S. at 464. The amount of the refund is usually quite trivial compared with the employer's potential liability for having violated the FLSA. In this case a payment of less than $600, made only days before trial, was invoked to extinguish a claim of over $10,000[4] and to avoid liability for counsel fees for the expensive pretrial litigation.[5]

The disputed portion of section 541.118(a)(6) provides that the window of correction may be invoked where the impermissible deduction "is inadvertent, or is made for

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[4] Records produced by Hannon during discovery revealed that Petitioners worked more than one thousand hours of overtime during the four month period in question. If the Petitioners are entitled to overtime pay under the FLSA, the applicable pay would be $11.25 per hour.

[5] The counsel fees claimed were $27,651.

reasons other than lack of work." The question presented concerns the scope of the second clause. The Secretary of Labor interprets that clause, in the context of the overall "salary basis" requirement, to apply only where the improper deduction, although deliberate, was an isolated event, not evidencing an intention to pay on an hourly basis, rather than on a salary basis. The Secretary has concluded that the existence of a policy or practice of impermissible deductions precludes use of the window of correction.

Five federal courts of appeals and the Iowa high court have expressly accepted the Secretary's interpretation. On the other hand, the Fifth Circuit in this case, like two other circuits, holds that the second clause applies even where the employer had engaged in a systemic practice of making impermissible deductions. In the Fifth Circuit's view, an employer can knowingly and systematically violate the salary basis regulations, and then avoid any liability by refunding the relatively trivial amount of the improper deductions to any employees who sue.

The Secretary's very different interpretation of the window of correction regulation was set forth in the Brief for the United States in *Auer*. The impermissible deduction in that case was deliberate, and thus could not qualify as "inadvertent" under the regulation. The employer in *Auer* asserted that the deduction could be corrected under the other clause of section 541.118(a)(6), which permits correction of a deduction made "for reasons other than lack of work." The government explained that the latter clause applied only to isolated (albeit deliberate) deductions, and could not be invoked if the deductions were pursuant to a practice or policy.

> [T]he single partial-week disciplinary deduction in this case was a one-time, unique event. There

> was no evidence presented to the court of appeals that respondents had *an established practice* of making such deductions. The window of correction is therefore available.

Brief for the United States, No. 95-897, p. 29 (emphasis added).[6] That brief quoted a 1991 Opinion Letter which made the same distinction:

> Where disciplinary deductions not permitted by the Regulations occur on a regular and recurring basis (e.g., because of an employer's *policy*), . . . we would question whether such employees are actually paid on a salary basis. . . .

Id. at 28, *quoting* Wage & Hour Manual (BNA) 99:5257 (Opinion Letter dated December 24, 1991) (emphasis added).

Since this Court's decision in *Auer*, the Department of Labor has aggressively advanced its interpretation of section 541.118(a)(6) in the lower courts. The Secretary has filed amicus briefs advancing that interpretation in

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[6] The United States expressly endorsed the decision of the court of appeals in *Auer* construing the regulation in this manner:

> The court of appeals interpreted that provision to "allow[ ] employers to treat otherwise eligible employees as salaried, regardless of the employer's one-time or unintentional failure to adhere to § 541.118(a)'s requirements." . . . (quoting *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, 616 (2d Cir. 1991)). . . . At the same time, the court concluded that the window of correction "is not available if the employer has a settled *policy* of making improper deductions." . . . That interpretation is consistent with the Secretary's construction of the "window of correction" provision.

Id. at 28 (emphasis added).

appeals in the Second, Sixth, Seventh and Ninth Circuits and at least one district court.

Takacs v. Hahn Automotive Corp., 246 F.3d 776, 782 (6th Cir. 2001); *Whetsel v. Network Property Service, LLC*, 246 F.3d 897, 900-02 (7th Cir. 2001); *Yourman v. Giuliani*, 229 F.3d 124, 128 (2d Cir. 2000); *Klem v. County of Santa Clara*, 208 F.3d 1085, 1091-92 (9th Cir. 1999); *Belcher v. Shoney's, Inc.*, 30 F.Supp.2d 1010, 1023-25 (M.D.Tenn. 1998). The Secretary took the same position in briefs filed prior to *Auer*. *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, 615-16 (2d Cir. 1991).

The Secretary has consistently maintained that the window of correction is unavailable where an employer has a practice or policy of making impermissible deductions, maintaining that a more permissive rule would allow employers to readily manipulate the salary basis regulations. The window of correction is limited to cases like *Auer* involving isolated incidents.

> [A]n employer that engages in a *practice* of making impermissible pay deductions, or has a *policy* that effectively communicates to its employees that such deductions will be made, necessarily has no intention of paying its employees on a "salary basis" and therefore has no recourse to the "window of correction" for deductions made. . . . The "window" should not be read to allow an employer to obtain the statutory overtime exemption where, as here, that employer has engaged in an actual *practice* of making impermissible deductions from pay pursuant to an established *policy*.

Takacs, 246 F.3d at 782 (*quoting* brief for the Department of Labor) (emphasis added). If the window of correction

were available to employers which had a practice of making deductions forbidden by the salary basis regulations, "the 'salary basis' test would be effectively shorn of all meaning." *Belcher v. Shoney's, Inc.*, 30 F.Supp.2d at 1024 (*quoting* brief for the Department of Labor).

> [A]n employer could . . . retroactively take advantage of the statutory exemption from paying overtime compensation irrespective of how egregiously it flouted the "salary basis" test. The Secretary did not intend to provide employers that engage in a practice of making impermissible deductions under the "salary basis" test with such an escape hatch.

Id. at 1024. See *Klem v. County of Santa Clara*, 208 F.3d at 1091-92 (summarizing and quoting interpretation set forth in amicus brief for the Department of Labor).

The Department of Labor in a post-*Auer* Opinion Letter has also reiterated that interpretation of the window of correction with specific regard to cases, such as the instant case, in which an employee's pay has been reduced for disciplinary reasons.

> The only discipline-related deduction permitted is one imposed as a penalty "in good faith for infractions of safety rules of major significance." The effect of making impermissible disciplinary deductions from "salaried" employees is discussed in section 541.118(a)(6). Where a *one-time* disciplinary deduction is made, the exemption will not be considered to have been lost in all workweeks if the employer reimburses the employee for such deduction and agrees to not take any such impermissible deduction in the future. Where disciplinary deductions not permitted by

> the Regulations occur on a *regular and recurring* basis (e.g., because of an employer's *policy*), we would question whether such employees . . . are actually paid on a salary basis and the exemption may be denied in all workweeks.

1998 WL 1147741 *2 (Dec. 4, 1998) (emphasis added).

In *Auer* this Court explained that the Secretary of Labor's interpretation of section 541.118 is ordinarily dispositive.

> Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless "'plainly erroneous or inconsistent with the regulation.'" *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989).

519 U.S. at 461.

The Fifth Circuit, however, expressly rejected the Secretary's interpretation:

> We decline to extend *Auer* deference to the Secretary's interpretation. . . . [T]he Secretary's interpretation . . . is insufficient to overcome the interpretation's contradiction with the plain language of the regulation, which allows the window of correction to be invoked for the conduct at issue here.

(App. 12).

II. THERE IS A WIDESPREAD CONFLICT AMONG THE CIRCUITS REGARDING THE SCOPE OF THE WINDOW OF CORRECTION REGULATION

The Fifth Circuit candidly acknowledged that there is a widespread conflict among the courts of appeals regarding the scope of the window of correction regulation. "Other circuits that have addressed the question whether the window of correction applies to all deductions made for reasons other than work have reached conflicting conclusions." (App. 10). The interpretation of section 541.118(a)(6) adopted by the Fifth Circuit has also been endorsed by the Third[7] and Eleventh[8] Circuits. On the other hand, as we explain below, the Second, Sixth, Seventh, Eighth and Ninth Circuits, as well as the Supreme Court of Iowa, have accepted the Secretary's interpretation.

Prior to this Court's decision in *Auer* both the Eighth and Second Circuits had concluded that the window of correction was not available to an employer with a practice of making impermissible deductions. The Second Circuit decision was issued in a case brought by the Secretary of Labor herself. *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, 616 (2d Cir. 1991) ("The exception in subsection (6) applies to one-time or inadvertent deductions, not to a settled policy of subjecting the pay of employees to reductions.") (*quoting Knecht v. City of Redwood*, 683 F.Supp. 1307, 1311 (N.D.Cal. 1987)). The Eighth Circuit decision in *Auer* itself relied on *Martin*. *Auer v. Robbins*, 65 F.3d 902, 711 (*quoting Martin*), 711 ("The 'window of correction' is

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[7] *Balgowan v. State of New Jersey*, 115 F.3d 214, 219 (3d Cir. 1997).

[8] *Davis v. City of Hollywood*, 120 F.3d 1180-81 and n.2 (11th Cir. 1997).

not available if the employer has a settled policy of making improper deductions from compensation.") (8th Cir. 1995).

Since *Auer* the leading decision endorsing the Secretary's interpretation is the Ninth Circuit opinion in *Klem v. County of Santa Clara*, 208 F.3d 1085 (9th Cir. 1999).

> [U]nder the Secretary's interpretation, an employer "that engages in a practice of making impermissible deductions in its employees' pay, or has a policy that effectively communicates to its employees that such deductions will be made, necessarily has no intention of paying its employees on a 'salary basis.'" ... When an employer has a practice and policy of noncompliance with those regulations, the Secretary reasons, it cannot demonstrate an intent to comply with the regulations and to pay its employees on a salaried basis. Under those circumstances, the employer cannot ... use the window of correction.... [T]he Secretary's interpretation is entitled to deference, and the district court did not err in relying on it.

208 F.2d at 1091-93. The Ninth Circuit has applied this interpretation on repeated occasions. *Block v. City of Los Angeles*, 253 F.3d 410, 419-20 (9th Cir. 2001) (applying the "Secretary's interpretation that window of correction is not available when there is an actual pattern o[r] practice of making impermissible disciplinary deductions."); *Hans v. Alyeska Pipeline Service Co.*, 2001 WL 936652 *1 (9th Cir. Aug. 16, 2001); *Morsch v. City of Los Angeles*, 1999 WL 985279 *2 (9th Cir. Oct. 27, 1999). The Second Circuit quoted the Ninth Circuit opinion in *Klem* in holding that "the window of correction is not available if an employer 'engages in a practice of making impermissible deductions

in its employees pay. . . . '" *Yourman v. Giuliani*, 229 F.3d 124, 128 (2d Cir. 2000).

The Seventh Circuit also agrees that the window of correction is not available to an employer which had a practice or policy of making impermissible deductions. "[W]e hold that when an employer has a practice or policy of improper deductions as defined in *Auer*, the window of correction provided in 29 C.F.R. § 541.118(a)(6) is not available." *Whetsel v. Network Property Services, LLC*, 246 F.3d 897, 904 (7th Cir. 2001). Similarly, the Sixth Circuit has

> conclude[d] that the Secretary's interpretation of the regulation, that the "window of correction" defense is not available to an employer who has a policy of making [impermissible] pay deductions . . . is both reasonable and consistent with the FLSA regulations. . . . [W]e defer to such interpretation.

Takacs v. Hahn Automotive Corp., 246 F.3d 776, 783 (6th Cir. 2001).

The Supreme Court of Iowa in turn relied on the decisions in the Sixth, Seventh, and Ninth Circuits in arriving at

> an interpretation of the regulation in which the window of correction is only available to those employers who do not have an established policy of deducting their employees' pay for [impermissible] reasons yet, in a few selected instances, have [done so].

Anthony v. State, 632 N.W. 2d 897, 904 (Iowa 2001).

The linchpin of the decision of the court of appeals in the instant case was its insistence that section 541.118(a)(6) is entirely unambiguous, leaving no question of interpretation to be resolved in light of the Secretary's construction of the regulation.

> We decline to extend *Auer* deference to the Secretary's interpretation, because § 541.118(a)(6) is *unambiguous*. . . . [T]he Secretary's interpretation . . . is insufficient to overcome the interpretation's contradiction with the plain language of the regulation. . . .

(App. 12) (emphasis added). Other circuits have concluded, to the contrary, that the language of section 541.118(a)(6) could reasonably be construed in the manner urged by the Secretary.

> Because we consider the "window of correction" regulation to be *ambiguous* and because we do not believe that the Secretary's interpretation of the regulation is clearly erroneous or inconsistent with the FLSA regulations, we defer to such interpretation.

Takacs, 246 F.3d at 783 (emphasis added).

> We conclude that the regulation is *ambiguous* regarding whether the window is available to correct a policy or practice of docking. . . . While one may argue that the Secretary's interpretation is strained, it sufficiently comports with the language so as not to be declared unreasonable or plainly erroneous.

Whetsel, 246 F.3d at 901-03 (emphasis added); see *Klem*, 208 F.3d at 1093 ("[d]efendant's arguments do not establish that the Secretary's interpretation is contrary to the text and purpose of the relevant regulations.").

The court of appeals in the instant case, like the similar decisions in the Third and Eleventh Circuits, believed that rejection of the Secretary's decision was compelled by this Court's decision in *Auer*.

> The Court's interpretation of the window of correction in *Auer* informs our decision here. . . . The Supreme Court has interpreted the regulation and noted no ambiguity. *Auer*, 519 U.S. at 463. Having interpreted the statute [sic], it applied it to the facts without pausing to ponder unstated exceptions.

(App. 6, 15); see *Davis v. City of Hollywood*, 120 F.3d 1178, 1181 n.2 (11th Cir. 1997); *Balgowan v. State of New Jersey*, 115 F.3d 214, 219 (3d Cir. 1997). On the other hand, several circuits which have accepted the Secretary's interpretation of section 541.118(a)(6) have insisted that nothing in *Auer* is inconsistent with the Secretary's view. *Takacs*, 246 F.3d at 782 ("The Supreme Court [in *Auer*] did not address the central question in this case"); *Whetsel*, 246 F.3d at 902 ("We also note that the issue facing this court has not been settled by *Auer*."); *Klem*, 208 F.3d at 1093.

The existence of this conflict is widely recognized. In *Anthony v. State*, 632 N.W. 2d 897, 904 (Iowa 2001), the Iowa Supreme Court noted that the decisions in the Second, Sixth, Seventh and Ninth Circuits, with which it agreed, were contrary to the decision in the Eleventh Circuit. The Ninth Circuit decision in *Klem v. County of Santa Clara*, 208 F.3d 1085, 1094 (9th Cir. 1999), criticized the decisions in the Third and Eleventh Circuits because they did not "addres[s] the Secretary of Labor's interpretation of the window-of-correction rule." The Sixth Circuit

refused to follow the contrary decisions in the Third Circuit and elsewhere because

> [un]like this court, those courts reached their conclusions without the benefit of the Secretary's interpretation of the "window of correction" regulation . . . [W]e find those cases to be unpersuasive.

Takacs v. Hahn Automotive Corp., 246 F.3d 776, 783 (6th Cir. 2001). See *Whetsel v. Network Property Services, LLC*, 246 F.3d 897, 903 (7th Cir. 2001) (noting contrary decisions in the Third and Eleventh Circuits); *Belcher v. Shoney's, Inc.*, 30 F.Supp.2d 1010, 1022 (M.D.Tenn. 1998) ("The courts are split on this issue."); *Hoffman v. Sbarro, Inc.*, 982 F.Supp. 249, 256-57 (S.D.N.Y. 1997) ("courts in the past have disagreed on this point. . . . [T]his split was not resolved by *Auer*. . . .").

The Fifth Circuit in the instant case was harshly critical of the courts of appeals having reached a different conclusion about the scope of the window of correction. The reasoning of the Ninth Circuit in *Klem*, the Fifth Circuit objected, "is circular." (App. 13 n.12). The Second Circuit decision in *Yourman* was dismissed by the court below on the ground that its conclusion was based on "little discussion." (App. 12 n.11). The opinion of the Seventh Circuit in *Whetsel* was criticized as "unrealisti[c]" (App. 15 n.13), "unpersuasive" (App. 15) and "backwards." (App. 14).

The inter-circuit conflict regarding the interpretation of section 541.118(a)(6) is mature and well established. Eight different circuits, as well as the highest court of one state, have now addressed the question presented. The issue is ripe for resolution by the Court.

III. THE QUESTION PRESENTED BY THIS CASE IS OF GREAT IMPORTANCE TO THE SCOPE OF THE FAIR LABOR STANDARDS ACT

Like the "working supervisors" in this case, there are literally tens of millions of employees whose status as executive, administrative or professional employees turns on whether or not they are paid on a salary basis. Whether those workers are exempt from the protections of the Fair Labor Standards Act, particularly whether they are entitled to compensation for overtime work, has great financial consequences for employees and employers alike.

The Secretary's salary basis regulations are central to the integrity of the regulatory scheme delineating the employees who may fall outside of the FLSA because they are deemed executive, administrative or professional employees. In the absence of the salary basis requirement, employers could easily construct a compensation system which was an hourly wage in all but name, and could evade the FLSA in less egregious ways. In this case neither the employer nor the Court of Appeals denied that the deductions made by Hannon were impermissible under the regulations.

The Fifth Circuit's decision turns the "window of correction" into a permanently wide open door which any employer can use to disregard the Department of Labor's salary basis regulation. Under the decision below, an employer can knowingly adopt a policy of violating the salary basis regulations, confident that – as a practical matter – the exempt status of the workers involved will never be affected. All an employer need do to avoid liability for having such a policy is to refund the improper deductions to any employee who files suit to enforce the FLSA.

Most employees would find it imprudent or impossible to bring such suits, since an employer which successfully invokes the window of correction avoids entirely any liability under the FLSA, including any obligation to pay counsel fees. As happened here, an employer could wait until the eve of trial, when the employee had incurred substantial litigation costs and his or her attorney had invested hundreds of hours in the case, and then wipe out the meritorious claim by making a modest payment that is a small fraction of the amount claimed. No sensible attorney would represent an employee whose claim forseeably could be extinguished in that manner.

The decision below has serious implications for the administration of the FLSA by the Secretary of Labor. In three circuits the Secretary cannot with any confidence proceed in any cases under the salary basis regulation. In the Third, Fifth and Eleventh Circuits those claims are no longer generally viable,[9] no matter how egregious the violation of the salary basis regulations. The inter-circuit conflict raises obvious practical problems for national employers operating in several circuits. The enforceable legal obligations of such a firm, like the rights of their employees to overtime compensation, will vary from circuit to circuit. *See, e.g., Belcher v. Shoney's, Inc.*, 30 F.Supp.2d

[9] Such claims would be viable only if the employer which set out to violate the regulation was so inept as to make deductions based on the lack of work, the only form of impermissible deduction which could not be retroactively corrected under the decisions of the Third, Fifth and Eleventh Circuits.

1010 (M.D.Tenn. 1998); *Hoffman v. Sbarro, Inc.*, 982 F.Supp. 249 (S.D.N.Y. 1997).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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317 F.3d 489 (5th Cir. 2003)

KAREN MOORE, DERRICK L. NICHOLS, SHAWYNA FRANK, GEORGE JAMES, EUGENE PAGE, MARY ANN FRYE, and LISA A. GREEN,

Plaintiffs-Appellees-Cross-Appellants,

v.

HANNON FOOD SERVICE, INC.; Et Al.,

Defendants,

HANNON FOOD SERVICE, INC.; HANNON'S FOOD SERVICE, INC.; HANNON'S FOOD SERVICE OF JACKSON, INC.; and HANNON'S FOOD SERVICE OF NATCHEZ, INC.,

Defendants-Appellants-Cross-Appellees.

No. 01-60844.

United States Court of Appeals, Fifth Circuit.

January 20, 2003.

T. Jackson Lyons (argued), T. Jackson Lyons & Associates, Jackson, MS, for Plaintiffs-Appellees-Cross-Appellants.

Wendy Moore Shelton (argued), Stephen W. Rimmer, Watkins, Ludlam, Winter & Stennis, Jackson, MS, for Defendants-Appellants-Cross-Appellees.

Appeals from the United States District Court for the Southern District of Mississippi.

Before JONES, SMITH and SILER,* Circuit Judges.

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* Judge of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

JERRY E. SMITH, Circuit Judge:

Hannon Food Service, Inc.; Hannon's Food Service, Inc.; Hannon's Food Service of Jackson, Inc.; and Hannon's Food Service of Natchez, Inc. (collectively "Hannon") appeal a judgment as a matter of law ("j.m.l.") in this action brought pursuant to the Fair Labor Standards Act ("FLSA") awarding overtime benefits to a group of restaurant managers. Concluding that Hannon properly availed itself of the window of correction provided for at 29 C.F.R. § 541.118(a)(6), we reverse and render judgment in favor of defendants.

I.

A.

Hannon[1] owns various KFC restaurants throughout Mississippi. Plaintiffs were employed as restaurant managers at a salary of $300 per week plus a monthly bonus of 2% of the gross sales of the restaurant they managed. Hannon had a policy of deducting recurrent cash register shortages from the supervising manager's monthly bonus. In November 1997, Hannon began deducting these shortages from the managers' weekly salaries rather than their monthly bonuses, ostensibly to increase the managers' responsiveness to the problem. This new practice resulted in a total of seventeen deductions across four of the plaintiffs; the other plaintiffs incurred no

[1] The various Hannon companies named as defendants share common family ownership and make at least some management decisions in collaboration.

deductions. Salaries were not otherwise decreased for any reason.

Hannon made its legal counsel aware of the policy in February 1998, and counsel prepared a memorandum advising Hannon to discontinue the practice. Hannon promptly reverted to the previous practice of taking the deductions from the bonuses.

B.

Plaintiffs sued Hannon on May 28, 1998,[2] alleging violations of the FLSA, as amended, 29 U.S.C. § 216(b). On September 13, 2000, Hannon tendered plaintiffs the total amount of all improper deductions plus 8% interest from the dates of the deductions to September 18, 2000, the date then set for trial. Hannon later moved for summary judgment and filed a stipulation of facts to which all parties agreed. Plaintiffs filed a cross-motion for summary judgment. The district court granted j.m.l. for plaintiffs, finding that plaintiffs were not exempt *bonā fide* executive employees for a four-month period, because they were "subject to" improper deductions within the meaning of C.F.R. § 541.118(a); the court rejected Hannon's argument that § 541.118(a)(6) allowed it to correct its error and maintain the exempt status of the employees. The court ordered Hannon to pay each plaintiff four months of overtime pay.

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[2] The original complaint was filed by Karen Moore and Derrick Nichols against Hannon Food Service, Inc. The Third Amended Complaint, filed March 31, 1999, resulted in the current arrangement of parties.

II.

Hannon maintains that the district court should have applied the window of correction specified in 29 C.F.R. § 541.118(a)(6), which would have allowed Hannon to avoid liability because they reimbursed the improper deductions. Hannon contends that the plain language of the regulation, as interpreted by *Auer v. Robbins*, 519 U.S. 452, 463, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997), requires the window of correction to be available for any deduction made for any reason other than lack of work.

Plaintiffs argue that application of the window of correction should be denied, because the deductions resulted from a policy that extended over four months. Plaintiffs specifically refer to *amicus curiae* briefs filed in other circuits on behalf of the Secretary of Labor interpreting § 541.118(a)(6) as being unavailable where a policy or practice underlies the improper deductions.[3]

Plaintiffs also cross-appeal the denial of overtime compensation before the time of the deduction, limited by the two-year limitations period, and the denial of liquidated damages. We review a j.m.l. *de novo*. *Casarez v. Burlington N./Santa Fe Co.*, 193 F.3d 334, 336 (5th Cir. 1999).

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[3] *See, e.g., Klem v. County of Santa Clara*, 208 F.3d 1085, 1091-92 (9th Cir. 2000); *Whetsel v. Network Prop. Servs.*, 246 F.3d 897, 900-01 (7th Cir. 2001).

III.

A.

Though the FLSA establishes a general rule that employers must pay their employees overtime compensation, executive, administrative, and professional employees are exempt. *See* 29 U.S.C. § 213(a)(1). The Secretary has broad authority to "define and delimit" the scope of these exemptions. *Id.; see also Auer,* 519 U.S. at 456, 117 S.Ct. 905. Among the requirements for the exemption is the salary-basis test, 29 C.F.R. § 541.118,[4] under which the employee must receive "each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." § 541.118(a).

In some circumstances, an employee may maintain his exempt status, notwithstanding improper deductions, under the window of correction established by § 541.118(a)(6), which reads:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand,

[4] The duties test, *see* 29 C.F.R. § 541.1, and the salary level test, *see* 29 C.F.R. § 541.1(f), are not at issue here.

> where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

29 C.F.R. § 541.118(a)(6).

"The plain language of the regulation sets out 'inadvertence' and 'made for reasons other than lack of work' as *alternative* grounds permitting corrective action." *Auer,* 519 U.S. at 463, 117 S.Ct. 905. In *Auer,* the Court therefore allowed the defendant to correct an improper deduction resulting from a disciplinary suspension, even though it was intentional. *Id.*

The Court's interpretation of the window of correction in *Auer* informs our decision here. In *Auer,* however, the Court did not have the benefit of the interpretation of § 541.118(a)(6) proffered by the Secretary later in *Klem* and *Whetsel,* which, if adopted, would narrow the regulation from the Court's reading of broad applicability. Furthermore, *Auer* applied the window of correction to a single deduction, 519 U.S. at 463, 117 S.Ct. 905, and the Court had already determined that the plaintiff was not "subject to" deductions within the meaning of the salary-basis test, *id.* at 461-62, 117 S.Ct. 905. We therefore consider the applicability of the window of correction to the facts of this case in light of the Secretary's interpretation.

B.

Though we did not have a brief from the Secretary in this case, the Ninth Circuit summarized her position to be that

the window of correction is available only to employers that have demonstrated the "objective intention" to pay their employees on a salaried basis. When an employer has demonstrated such an objective intention, the window of correction is available to cure inadvertent or isolated violations of the "salary basis" regulations. However, when an employer has not demonstrated that intention, it cannot, after the fact, use the window of correction to bring itself into compliance with the "salary basis" regulations and thereby turn nonsalaried employees into salaried employees.

Further, under the Secretary's interpretation, an employer "that engages in a practice of making impermissible deductions in its employees' pay, or has a policy that effectively communicates to its employees that such deductions will be made, necessarily has no intention of paying its employees on a 'salary basis.'" The question is not whether an employer has the subjective intention that its employees be exempt from the FLSA's overtime provisions. Rather, it is whether the employer has evinced the objective intention to pay its employees on a salaried basis as defined in the Secretary's regulations. When an employer has a practice and policy of noncompliance with those regulations, the Secretary reasons, it cannot demonstrate an intention to comply with the regulations and to pay its employees on a salaried basis. Under those circumstances, the employer cannot treat its employees as exempt; nor can it use the window of correction to comply retroactively with the regulations and thereby obtain an exemption for a class of employees that it actually never paid on a salaried basis.

Klem, 208 F.3d at 1091. *Accord Whetsel*, 246 F.3d at 900-01.

C.

Although we must give effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), such deference is not appropriate for an interpretation of a regulation found in an *amicus curiae* brief.[5] In *Auer*, the Court addressed what weight should be afforded such interpretations of regulations. The Court considered an *amicus curiae* brief by the Secretary of Labor, filed at the request of the Court, that interpreted what it means to be "subject to" impermissible pay deductions under the salary-basis test created in § 541.118(a). *Auer*, 519 U.S. at 461, 117 S.Ct. 905.

The Secretary's interpretation required more than a theoretical possibility that exempt employees could incur deductions in pay; it required "either an actual practice of making such deductions or an employment policy that creates a 'significant likelihood' of such deductions." *Id.* The Court held "[b]ecause the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation." *Id.* (citations and internal quotation marks omitted). It found

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[5] *See Christensen v. Harris County*, 529 U.S. 576, 587-89, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000); *cf. Owsley v. San Antonio Indep. Sch. Dist.*, 187 F.3d 521, 525 (5th Cir. 1999) ("Opinion letters, which are issued without . . . formal notice and rulemaking procedures . . . do not receive the same kind of *Chevron* deference as do administrative regulations.").

"[t]hat deferential standard [was] easily met" because the "critical phrase 'subject to' comfortably bears the meaning the Secretary assigns." *Id.*

In *Christensen,* the Court explicated when *Auer* deference is proper. There, petitioners challenged their employer's policy that prevented them from choosing to receive cash compensation for accrued compensatory time in lieu of taking time off; they contended the policy contradicted 29 U.S.C. § 207(o)(5), "which requires that an employer reasonably accommodate employee requests to use compensatory time . . . " *Christensen,* 529 U.S. at 580-81, 120 S.Ct. 1655. The Court considered an opinion letter[6] establishing the Secretary of Labor's interpretation of 29 C.F.R. § 553.23(a)(2), which "provides only that 'the agreement or understanding [between the employer and employee] may include other provisions governing the preservation, use, or cashing out of compensatory time so long as these provisions are consistent with [§ 207(o)].'" *Id.* at 587-88, 120 S.Ct. 1655. The opinion letter argued that § 207(o) precluded the employer from requiring employees to use their compensatory time.[7]

The Court declined to adopt the Secretary's interpretation of the regulation, holding that although "an agency's interpretation of its own regulation is entitled to

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[6] The Secretary also appeared as *amicus curiae. Christensen,* 529 U.S. at 577, 120 S.Ct. 1655.

[7] As the Court explained, the Secretary argued "that the express grant of control to employees to use compensatory time, subject to the limitation regarding undue disruptions of workplace operations, implies that all other methods of spending compensatory time are precluded." *Christensen,* 529 U.S. at 582-83, 120 S.Ct. 1655.

deference . . . *Auer* deference is warranted only when the language of the regulation is ambiguous." *Id.* (citations omitted). "To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Id.* Simply noting ambiguity in some part of the regulation is insufficient; there must be ambiguity with respect to the specific question considered.[8] Absent ambiguity, "interpretations contained in formats such as opinion letters are 'entitled to respect' under our decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 [ ](1944), but only to the extent that those interpretations have the 'power to persuade.'" *Id.* at 587, 65 S.Ct. 161.

D.

Other circuits that have addressed the question whether the window of correction applies to all deductions made for reasons other than work have reached conflicting conclusions. Subsequent to *Auer,* the Eleventh Circuit had allowed the window of correction to an employer that made deductions for disciplinary reasons, then reimbursed the sums and adopted a written policy proscribing unpaid suspensions. The court did not comment on the Secretary's interpretation. *Davis v. City of Hollywood,* 120 F.3d 1178, 1180-81 (11th Cir. 1997) (quoting *Auer*, 519 U.S. at 463, 117 S.Ct. 905). The Third Circuit has indicated support for this position in *dictum,* but also has not considered specifically the Secretary's interpretation. *Balgowan v. New*

[8] *See Christensen,* 529 U.S. at 588, 120 S.Ct. 1655 ("Because the regulation is not ambiguous on the issue of compelled compensatory time, *Auer* deference is unwarranted.").

Jersey, 115 F.3d 214, 219 (3d Cir. 1997) ("Accordingly, if any DOT engineer's pay had been docked, the 'window of corrections' exemption could have been used by the State to preserve that engineer's exempt status.").

The Ninth Circuit has held that the pattern or policy of deductions does prevent application of the "window of correction." *Klem,* 208 F.3d at 1094-96 (granting deference to the Secretary's interpretation and holding that contrary language in *Paresi v. City of Portland,* 182 F.3d 665, 668 (9th Cir. 1999), was *dictum*). The Ninth Circuit did not contend there was any ambiguity in the regulation requiring deference to the Secretary's interpretation.[9] The Seventh Circuit, citing *Klem,* also has adopted the Secretary's interpretation in *Whetsel,* 246 F.3d at 904, and did find the requisite ambiguity, *id.* at 901.[10] Relying heavily

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[9] *Klem* was decided a month before *Christensen.* In later affirming *Klem, see Block v. City of Los Angeles,* 253 F.3d 410, 419-20 (9th Cir. 2001), the Ninth Circuit did not reconsider the *Klem* holding in light of *Christensen*'s requirements. Had it done so, it might have found that *Paresi* advised a different outcome.

Paresi held that because there was no "pattern of deductions" the city could correct the allegedly improper deductions under the window of correction rule. *See id.* at 668. The court continued to note that "[i]n any event, the text of the regulation contains no such limitation. . . . The deductions made and corrected by the City were made for disciplinary reasons, which are 'reasons other than lack of work' and, thus, are covered by the window of correction." *Id.* Though the "discussion in *Paresi* focused exclusively on the wording of the regulation and did not address . . . the Secretary of Labor's interpretation," *Klem,* 208 F.3d at 1094, *Paresi*'s plain-language analysis arguably undermines any contention that the regulation is "ambiguous" such that it requires interpretation by the Secretary.

[10] Before *Whetsel,* the Seventh Circuit, like the Ninth Circuit, had also stated that the language of the regulation allowed correction despite a pattern or practice. *DiGiore v. Ryan,* 172 F.3d 454, 465 (7th

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on *Whetsel* and *Klem,* the Sixth Circuit reached the same conclusion. *Takacs v. Hahn Auto. Corp.,* 246 F.3d 776, 782-83 (6th Cir. 2001). The Second Circuit also adopted this position. *Yourman v. Giuliani,* 229 F.3d 124 (2d Cir. 2000).[11]

E.

We decline to extend *Auer* deference to the Secretary's interpretation, because § 541.118(a)(6) is unambiguous. "[T]he plain language of the regulation sets out 'inadvertence' and 'made for reasons other than lack of work' as *alternative* grounds permitting corrective action." *Auer,* 519 U.S. at 463, 117 S.Ct. 905. Nothing in the regulation indicates that any further restriction on its application is implied or necessary.

Cir. 1999) ("Even if these five incidents rose to the level of frequent and, thus, constituted an actual practice by the SOS officials, the officers would still be exempt from the FLSA because the SOS officials availed themselves of the regulatory 'window of correction.' "). Overruling *DiGiore,* the *Whetsel* court held that because *DiGiore* did not discuss the Secretary's interpretation, "the court might not have had that argument before it, which is a sufficient reason for reconsidering this part of *DiGiore* and deferring to the Secretary's construction." *Whetsel,* 246 F.3d at 903-04.

[11] It did so with little discussion, relying on *Klem* and *Martin v. Malcolm Pirnie, Inc.,* 949 F.2d 611, 615-17 (2d Cir. 1991). Although *Martin* limits the exceptions [sic] applicability to "one-time or unintentional failure[s] to adhere to § 541.118(a)'s requirements," *id.* at 616, it predates *Auer* and does not address the "lack of work" clause. It does not appear that the defendant in *Martin* proffered an argument that the "lack of work" clause created a basis for correction; rather it relied on the argument that it had no policy that violated the statute. *Id.*

As stated earlier, the *Klem* court did not try to determine whether the regulation is ambiguous.[12] In finding the requisite ambiguity, the *Whetsel* court relied "on the fact that the regulation does not explicitly state that it is available to correct a policy or pattern of deductions, thus leaving open the question of whether it applies to those circumstances." *Whetsel,* 246 F.3d at 901. The regulation, by its own terms, applies "where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work." This "ambiguity" is found

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[12] The court did discuss the requirements of *Auer* that the proposed interpretation be neither " 'plainly erroneous [n]or inconsistent with the regulation.' " *Klem,* 208 F.3d at 1089 (quoting *Auer,* 519 U.S. at 461, 117 S.Ct. 905). Rejecting the defendant's argument that "the Secretary's contrary interpretation imports additional limitations into the rule that are inconsistent with the rule's text," *id.* at 1092, the court stated that "we need not conclude that her interpretation is the only reasonable construction of that rule, or even the best one. It merely must be sufficiently connected to the rule's text to be consistent with the rule." *Id.* at 1093.

In searching for textual support, the court focused on the word "lost" in the fourth sentence:

> For an exemption to be capable of being "lost," it first must have been obtained. The window of correction, therefore, is available to employers that have exempt employees, because those are the only employers who can *lose* exemptions. An employer that does not pay on a salaried basis does not have exempt employees. The window of correction is unavailable to such an employer, because the window operates to protect employers from *losing* exemptions or, in other words, to preserve existing exemptions.

Id. This reasoning is circular. *Any* improper conduct *could* result in the employee not being exempt; the regulation creates exceptions where improper conduct can be rehabilitated. The general rule cannot inform the reader what the exceptions are; the text of the window of correction can.

only by contrasting the regulation's language with the Secretary's interpretation.

Under *Christensen,* this approach is backwards. The presence or lack of ambiguity in a regulation should be determined without reference to proposed interpretations; otherwise, a regulation will be considered "ambiguous" merely because its authors did not have the forethought expressly to contradict any creative contortion that may later be constructed to expand or prune its scope.

Responding to the argument that "because the regulatory language singles out only practices or policies of deductions for lack of work for incorrigibility, the regulation implicitly indicates that any other kind of policy or practice can be corrected," the Court in *Christensen* stated that "the canon of *expressio unius est exclusio alterius* has reduced force in the context of interpreting agency administered regulations and will not necessarily prevent the regulation from being considered ambiguous." *Id.* at 903 (citations omitted). *Expressio unius* has been defined by the Supreme Court as meaning that "expressing one item of an associated group or series excludes another left unmentioned." *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 122 S.Ct. 2045, 2049, 153 L.Ed.2d 82 (2002) (quotation marks and alterations omitted). This is not truly a case of *expressio unius,* because the regulation is not silent as to deductions resulting from a policy or practice for reasons other than a lack of work; they are a subset of the second prong of the exception.[13]

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[13] The *Whetsel* court implied that when a regulation makes reference to a particular class of conduct, the court should not necessarily find it

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The argument that the regulation is ambiguous is unpersuasive. The Supreme Court has interpreted the regulation and noted no ambiguity. *Auer*, 519 U.S. at 463, 117 S.Ct. 905. Having interpreted the statute, it applied it to the facts without pausing to ponder unstated exceptions. *Id.* at 463-64, 117 S.Ct. 905. The entire regulation reads coherently and plainly reaches any deductions made for reasons other than lack of work.

Absent ambiguity, the Secretary's interpretation is "entitled to respect" under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944), "but only to the extent that those interpretations have the 'power to persuade,'" *see Christensen,* 529 U.S. at 587, 120 S.Ct. 1655 (quoting *Skidmore,* 323 U.S. at 140, 65 S.Ct. 161). Though we afford the Secretary's interpretation its due respect under *Skidmore*,[14] it is insufficient to overcome the

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unambiguous that the regulation intends to reach any particular subclass of that conduct. This unrealistically requires an agency to enumerate every conceivable subclass of a covered conduct in order to avoid having their regulations declared ambiguous. This is a needless burden to place on agencies. A genuine application of *expressio unius* would be to draw the presumption that there are no other types of improper deduction besides the two named that can be cured under the window of correction. And given that the regulation is an exception to a general rule that improper deductions will cause an employee to lose his exempt status, that conclusion would be appropriate.

[14] *Skidmore* requires only that we accord to an administrative judgment weight dependent "upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140, 65 S.Ct. 161. Ultimately, *Skidmore* analysis is of limited value in interpreting regulations, given that it stops short of requiring deference and is likely to be invoked only when a court has already found the regulation to be unambiguous. *Cf. United States v. Mead Corp.*, 533 U.S. 218, 250, 121 S.Ct.

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interpretation's contradiction with the plain language of the regulation, which allows the window of correction to be invoked for the conduct at issue here.

IV.

The district court erred in finding that the window of correction was unavailable in this case. Furthermore, the record demonstrates that Hannon properly availed itself of the exception. Hannon tendered plaintiffs the amount of all deductions plus interest five days before trial. Reimbursements may be made at any time to preserve the window of correction.[15] Moreover, Hannon has changed the offending policy. We therefore REVERSE and RENDER judgment in favor of defendants.[16]

2164, 150 L.Ed.2d 292 (2001) (Scalia, J., dissenting) ("[T]he rule of *Skidmore* deference is an empty truism and a trifling statement of the obvious: A judge should take into account the well-considered views of expert observers.").

[15] *Auer*, 519 U.S. at 463-64, 117 S.Ct. 905 ("[I]n petitioners' view, reimbursement must be made immediately upon the discovery that an improper deduction was made. The language of the regulation, however, does not address the timing of reimbursement, and the Secretary's amicus brief informs us that he does not interpret it to require immediate payment. Respondents are entitled to preserve Guzy's exempt status by complying with the corrective provision in § 541.118(a)(6).").

[16] Because we conclude that Hannon properly availed itself of the window of correction, we do not reach the cross-appeal.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

KAREN MOORE, DERRICK L. NICHOLS, SHAWYNA FRANK, GEORGE JAMES, EUGENE PAGE, MARY ANN FRYE, AND LISA A. GREENE — PLAINTIFFS

V. — CIVIL ACTION NO. 3:98-cv-380WS

HANNON FOOD SERVICE, INC., HANNON'S FOOD SERVICE, INC., HANNON'S FOOD SERVICE OF JACKSON, INC., HANNON'S FOOD SERVICE OF NATCHEZ, INC., AND HANNON'S FOOD SERVICE OF VICKSBURG, INC. — DEFENDANTS

MEMORANDUM ORDER AND OPINION

(Filed Sep. 28, 2001)

Before the court are defendants[1] Hannon Food Service, Inc.'s, Hannon's Food Service, Inc.'s, Hannon's Food Service of Jackson, Inc.'s, and Hannon's Food Service of Natchez, Inc.'s motion for summary judgment and plaintiffs Karen Moore's, Derrick Nichols', Shawyna Frank's, George James', Mary Ann Frye's and Lisa A. Green's cross-motion for summary judgment in the plaintiffs' action for recovery of overtime pay allegedly due them

[1] Defendant Hannon's Food Service of Vicksburg, Inc., was dismissed by order of this court on November 25, 1998.

under the Fair Labor Standards Act of 1938 ("FLSA"), Title 29 U.S.C. § 201, *et seq.*, attorney's fees and costs.[2] Defendants submit their motion under the auspices of Rule 56(b),[3] Federal Rules of Civil Procedure, while plaintiffs invoke Rule 56(a),[4] Federal Rules of Civil Procedure. This court has jurisdiction over this lawsuit pursuant to Title 28 U.S.C. § 1331.[5]

The parties have stipulated to the relevant facts. Upon consideration of those facts and the relevant law, the court concludes, as set forth below, that the plaintiffs are entitled to judgment as a matter of law. The court hereby grants summary judgment to the plaintiffs, as well as plaintiffs' motion for attorney's fees and costs.

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[2] The plaintiffs have chosen not to pursue their pendent state law claims asserted in their amended complaint. The court will therefore not rule on those claims; the state law claims are dismissed without prejudice.

[3] Rule 56(b), Federal Rules of Civil Procedure, provides:

> **(b) For Defendant Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

[4] Rule 56(a), Federal Rules of Civil Procedure, provides:

> **(a) For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

[5] Title 28 U.S.C. § 1331 provides that, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

FACTS

The defendants are all Mississippi corporations who operate Kentucky Fried Chicken ("KFC") restaurants and are subject to coverage under FLSA. Each of the plaintiffs is a former employee of the [sic] one of various defendants. During the relevant time period, each plaintiff was the manager of a KFC restaurant. The Plaintiffs were paid a fixed salary of $300.00 per week plus a monthly incentive bonus of two percent of the gross sales of the restaurant they managed. The defendants have compensated their managers by paying them a fixed salary plus a percentage of sales for over fifteen years.

The parties have stipulated that, except as to the issues raised in this action, the plaintiffs fell within the executive exemption to the overtime provision of FLSA. *See* 29 C.F.R. § 541.1.[6]

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[6] A bona fide executive employee under 29 C.F.R. § 541.1 is any employee:

(a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretionary powers; and

(e) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work

(Continued on following page)

It was the policy of the defendants that if a particular restaurant was experiencing regular cash shortages, the amount of the shortages during a particular month would be deducted from the employee's monthly bonus rather than their weekly salary. However, in 1997, the defendants noted that there was a trend of increasing cash register shortages at its various restaurants. The members of management then decided that deductions for cash register shortages would be taken out of the manager's weekly salary rather than their monthly bonus. The management concluded making the deductions from the

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in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: Provided, That this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separate branch establishment, or who owns at least a 20- percent interest in the enterprise in which he is employed; and

(f) Who is compensated for his services on a salary basis at a rate of not less than $155 per week (or $130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities: Provided, That an employee who is compensated on a salary basis at a rate of not less than $250 per week (or $200 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

29 C.F.R. § 541.1.

manager's weekly salary would encourage them to be more aware of cash shortages and more diligent in preventing future shortages.

Consequently, for a period of four months, beginning in November of 1997, and ending in February of 1998, the defendants made deductions from several of the plaintiffs' weekly salaries due to cash register shortages.[7] While the plaintiffs' weekly salaries were affected by these deductions, their overall monthly income, due to bonuses, was not affected. Furthermore, except from the claims made herein by the plaintiffs, the plaintiffs' weekly salaries were not otherwise decreased by the quality of work performed in any particular work week.

The defendants claim that, in February of 1998, during a conversation with counsel for defendants about various legal matters unrelated to the instant case, one of the defendants mentioned that deductions were being taken from the manager's weekly salary in an effort to improve the cash register shortage situation. Defendants' counsel thereafter prepared a memorandum instructing the defendants to cease making deductions from the managers' weekly salaries for cash shortages. Upon being

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[7] The records indicate, although not a part of the stipulated facts, that deductions were made from the weekly salaries of Karen Moore, Derrick Nichols, Eugene Page, and George James. Deductions were not made from the salaries of Mary Ann Frye, Lisa A. Greene, or Shawyna Frank during the four month period. However, plaintiff Frye testified that she would pay the shortages out of her pocket. Plaintiff Frank further testified that she had weekly deductions taken from her check following the robbery of her car and a seven-hundred dollar bank deposit. She testified that the deductions only began after she became a manager some two months after the robbery in March of 1995 or 1996.

advised by counsel that deductions should not be taken from the managers' weekly salaries, the defendants thereafter ceased making such deductions.

The plaintiffs are now claiming that they should be compensated for overtime for two years beginning in November of 1997. The defendants, on the other hand, argue that they should be allowed to avail themselves of the "window of correction" as set out in 29 C.F.R. § 541.118(a)(6),[8] and explained below, because they have tendered repayment of the deductions from the various plaintiffs' weekly salaries plus eight percent interest from the date of the deduction through September 18, 2000, the date set for trial.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *L.T. v. City of Jackson,* 145 F.Supp.2d 750, 755 (S.D. Miss. 2000). In

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[8] Section 541.118(a)(6) provides:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations in inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

resolving a motion for summary judgment, the court must refrain from weighing the evidence or making credibility determinations. *Ware v. Frantz,* 87 F. Supp. 2d 643, 645 (S.D. Miss. 1999). To overcome a properly supported motion for summary judgment, the non-moving party must present more than a mere scintilla of evidence. *Id.* In other words, summary judgment is inappropriate only where a reasonable jury, based on the evidence then presented to the court, could find for the non-moving party. *Id.*

ANALYSIS

The FLSA, Title 29 U.S.C. § 207,[9] obligates employers to pay workers overtime pay for hours worked in excess of forty hours per week. Section 213,[10] however, exempts employees who qualify as bona fide executive employees from section 207's coverage. The Secretary of Labor, who has been delegated the rule-making authority under the FLSA, sets forth the test for determining whether an employee is a bona fide executive employee in 29 C.F.R. § 541.1, *see* footnote 3, *supra.* The parties agree that every

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[9] Section 207(a)(2) provides in pertinent part:

> No employer shall employ any of his employees . . .
>
> (C) for a workweek longer than forty hours . . .
>
> unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

[10] Title 29 U.S.C. § 213 provides in pertinent part, "The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to – (1) any employee employed in a bona fide executive. . . ."

element of the test has been satisfied except whether the plaintiffs were compensated on "a salary basis" during the period for which the plaintiffs now seek overtime compensation, i.e., the two-year period beginning with November of 1997.

> An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

29 C.F.R. § 541.118(a). As indicated by section 541.118(a), commonly referred to as the "no-docking rule", an employee who is subject to improper deductions from his salary can be considered not to be compensated "on a salary basis" and, therefore, not a bona fide executive employee. *Whetsel v. Network Property Servs., LLC.*, 246 F.3d 897, 900 (7th Cir. 2001). In *Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 911, 137 L. Ed. 2d 79 (1997), the Supreme Court deferred to the Secretary's interpretation that exemption status is denied when "employees are covered by a policy that permits disciplinary or other deductions in pay 'as a practical matter.'" Under this standard, an employee is subject to a deduction "if there is either an actual practice of making such deductions or an

employment policy that creates a 'significant likelihood' of such deductions." *Id.*

Here, the parties seemingly concede that deductions from KFC managers' weekly salaries to reimburse KFC constitutes an impermissible deduction. The parties do not agree, however, that the deductions were such that the plaintiffs were "subject to" a reduction or deduction in salary within the meaning of the no-docking rule.

Notwithstanding the defendants' argument to the contrary, the record demonstrates that, at least for a four-month period, the defendants had an actual practice of making improper deductions, i.e., deductions for restaurant cash shortages, from KFC managers' weekly salaries, including plaintiffs Moore, Nichols, James and Page. The defendants' own records indicate that they made seventeen (17) total deductions from the weekly salaries of plaintiffs Moore, Nichols, James and Page, totaling $474.87, for restaurant cash shortages.[11] Based on the foregoing, there can be no doubt that the defendants had an actual practice of making improper deductions.

As to those plaintiffs whose salaries were not actually reduced for cash shortages, the court concludes that the

[11] Two deductions were made from Karen Moore's weekly salaries, once in December of 1997 and once in February of 1998. Eight deductions were made from Derrick Nichols' weekly salaries, four in November of 1997 and four in December of 1997. Five deductions were made from Eugene Page's weekly salaries, two in November of 1997, one in December of 1997, and two in February of 1998. Two deductions were made from George James' weekly salaries, both occurring in November of 1997.

defendants' policy created a significant likelihood that such deductions would in fact occur, thereby making those employees "subject to" the improper deductions within the meaning of C.F.R. § 541.118(a). The defendants themselves admit that KFC management made a policy decision to begin deducting the amounts of restaurant cash shortages from the weekly salaries of the managers in charge of the particular restaurant in November of 1997 and that they made said deductions from any manager's weekly salary whose restaurant suffered a cash shortage during the relevant period. Further, the policy of making deductions for cash shortages from the managers' weekly salaries was clear and particularized, i.e., the deductions were made as a practical matter from those managers' salaries whose restaurants suffered a cash shortage. *See, e.g., Belcher v. Shoney's, Inc.*, 30 F. Supp. 2d 1010, 1019-20 (M.D. Tenn. 1998) (holding that policy of subtracting reimbursements for cash shortages and other casualty losses from managers' salary was clear and particularized even if plaintiffs could not produce company-wide memorandum setting forth policy or show that every employee knew of policy). The court finds it of little significance that plaintiffs Frye, Greene, and Frank were fortunate not to have any restaurant cash shortages during the four-month span in which this policy was in effect and thus did not suffer an actual deduction. It is sufficient that the defendants' policy created a significant likelihood that Frye, Greene and Frank would suffer the deductions.[12]

[12] It is unlikely that the defendants would testify before this court that had the KFC restaurants under the management of Frye, Greene or Frank experienced restaurant cash shortages during this four-month

(Continued on following page)

Because the court concludes that the defendants, during the four-month period discussed herein, had an actual practice of making improper deductions as well as an employment policy that created a substantial likelihood that such deductions would occur, the court further concludes that the plaintiffs were "subject to" said improper deductions. The plaintiffs therefore do not qualify as exempt bona fide executive employees during the four-month period from November of 1997 to February of 1998. Accordingly, the plaintiffs are entitled to overtime pay as provided in Title 29 U.S.C. § 207.

The defendants argue, however, that they should be allowed to avail themselves of the window of correction as provided in 29 C.F.R. § 541.118(a)(6), *see* footnote 5, *supra*. The defendants argue that they should be allowed the benefit of the window of correction because their action was both inadvertent and was not made because of a lack of work as noted in section 541.118(a)(6), relying on *Auer, supra*.

The defendants' reliance on *Auer* is misplaced. The *Auer* court indeed concluded that the window of corrections defense was available to an employer who had made improper deductions from an employee's salary, but had nevertheless satisfied the strictures of 29 C.F.R. § 541.118(a), i.e., that the employee was not "subject to" deductions as within the meaning of that provision. 519 U.S. at 461-63, 117 S. Ct. at 911-12. The court, however,

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period, defendants would have refrained from making deductions from these managers' weekly salaries for reimbursement of those cash shortages.

did not address a situation such as that occasioned by the defendants' policy where the employee is in fact "subject to" improper deductions and thus does not qualify as an exempt bona fide executive employee.

Although the Fifth Circuit has not addressed this particular issue, several federal courts have held that "when an employer has a practice or policy of improper deductions as defined in *Auer*, the window of correction provided in 29 C.F.R. § 541.118(a)(6) is not available." *Whetsel*, 246 F.3d at 904; *accord Yourman v. Giuliani*, 229 F.3d 124, 128 (2d Cir. 2000); *Klem v. County of Santa Clara*, 208 F.3d 1085, 1093 (9th Cir. 2000); *Belcher*, 30 F. Supp. 2d at 1022-24; *Hoffmann v. Sbarro, Inc.*, 982 F. Supp. 249, 257 (S.D.N.Y. 1997). *But cf. Arrington v. City of Macon*, 973 F.Supp. 1467, 1474 (M.D. Ga. 1997). The court's decision in *Whetsel* is particularly instructive. As with others of the aforementioned cases,[13] the Secretary filed an *amicus curiae* with the court in *Whetsel* stating that it interpreted the regulations such that the window of correction defense is not applicable to a case where an employer has a practice or policy of making improper deductions from an employee's salary. 246 F.3d at 900-01. The court determined that the Secretary's interpretation of section 541.118(a)(6) was reasonable and thus entitled to due deference. *Id.* at 902-03. The court reasoned that the Secretary's interpretation focused on the objective intention of the employer. *Id.* at 902. The court concluded

[13] The Secretary also filed an *amicus curiae* brief in *Yourman*, *Belcher*, and *Klem*. In *Hoffman*, the district court relied on the Secretary's *amicus curiae* brief in *Auer*, which explained the policy the Secretary later argued in *Yourman*, *Belcher*, *Whetsel*, and *Klem*.

that "where the employer maintained a policy or practice of improper deductions, the employer had no objective intention to pay on a salary basis." *Id.* The court concluded that under those circumstances, there was never an exemption in the first place, and, thus, no exemption to be preserved by the window of correction. *Id.*

This court finds the reasoning of the *Whetsel* court, and those cases similarly decided, to be persuasive and, thus, adopts the view that the window of correction as provided in § 541.118(a)(6) cannot be used to remedy a practice or policy of improper deductions. The court further concludes that the defendants' admitted policy, however short-lived,[14] which resulted in seventeen deductions from various plaintiffs' weekly salaries over a four-month period of time, constituted a policy or practice of improper deductions. *See, e.g., Klem*, 208 F.3d at 1095 (holding that fifty-three instances of improper suspensions among 5300 exempt employees over a six-year period of time was sufficient to support finding that employer engaged in pattern of improper deductions from salaries of managers and registered nurses and thus did not intend to pay them on salary basis); *Rushing v. Shelby County Gov't*, No. 95-2485-V, 1997 WL 901901, at *4 (W.D. Tenn. April 23, 1997) (holding that window of correction unavailable to county employer who made seven deductions during [sic] involving several employees in 1992 and 1995). The court therefore rejects the defendants' argument that their

[14] Although in the minds of the defendants the policy was short-lived, the court is cognizant that, for those employees subject to the deductions, a four-month time span is significant.

violations of FLSA are remedied by the window of correction.

This court must now determine for what period of time the plaintiffs are entitled to overtime compensation. The plaintiffs argue that they are entitled to overtime compensation for a period of two years, beginning with November of 1997. The defendants, however, contend that the plaintiffs' recovery should be limited to the four-month span for which the exemption is lost. The court concludes that the plaintiffs are only entitled to overtime compensation during the period for which they were not exempt from the overtime provision of FLSA. Little guidance is provided for resolution of this issue, but the court finds instructive a portion of the language in section 541.118(a)(6), which provides in pertinent part: "The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made." Although not speaking directly to the facts of the instant case, this provision of section 541.118(a)(6) suggests to the court that, where the court concludes that impermissible deductions indicate that there is no objective intention of the employer to pay the employee on a salary basis as was the case here, the exemption does not exist for the period for which such improper deductions were made. In this case, improper deductions were made over a four-month period of time. During this four-month time span, the plaintiffs were not exempt within the meaning of FLSA. Therefore, only during the four-month period when the

employees were not exempt are they entitled to overtime compensation under FLSA. Accordingly, the plaintiffs' recovery for overtime compensation is limited to the four-month time period from November of 1997 to February of 1998.[15]

As the court has ruled in favor of the plaintiffs on the issue of liability for overtime compensation, Title 29 U.S.C. § 216(b)[16] mandates that the court award plaintiffs reasonable attorney's fees and costs to plaintiffs. *Accord Diaz v. Robert Ruiz, Inc.*, 808 F.2d 427, 429 (5th Cir. 1987).

CONCLUSION

For the foregoing reasons, this court grants summary judgment to plaintiffs in this action for overtime compensation under FLSA for a four-month period covering November 1997 to February 1998. The court further finds that the plaintiffs are entitled to reasonable attorney's fees and costs, upon their filing and supporting the proper motion. The defendants' motion for summary judgment is hereby denied. This court will issue a separate judgment in accordance with the local rules.

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[15] The parties have stipulated that, to the extent that the court determines that the plaintiffs are entitled to overtime compensation, the overtime hours worked by the plaintiffs will be calculated using the defendants' time records and, if the records are incomplete, counsel for plaintiffs and defendants shall agree upon a figure representing the average that was reflected by the records.

[16] Title 29 U.S.C. § 216(b) provides in pertinent part: "The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

SO ORDERED AND ADJUDGED, this the 28th day of September, 2001.

/s/ Henry T. Wingate
UNITED STATES DISTRICT JUDGE

Civil Action No. 3:98-cv-380WS

Memorandum Opinion and Order

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-60844

KAREN MOORE; DERRICK L NICHOLS; SHAWYNA FRANK; GEORGE JAMES; EUGENE PAGE; MARY ANN FRYE; LISA A GREEN

Plaintiffs-Appellees-Cross-Appellants

v.

HANNON FOOD SERVICE INC; ET AL

Defendants

HANNON FOOD SERVICE INC; HANNON'S FOOD SERVICE INC; HANNON'S FOOD SERVICE OF JACKSON INC; HANNON'S FOOD SERVICE OF NATCHEZ INC

Defendants-Appellants-Cross-Appellees

Appeals from the United States District Court for the Southern District of Mississippi, Jackson

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ON PETITION FOR REHEARING EN BANC

(Opinion 1/20/03, 5 Cir., ___, ___ F.3d ___)

(Filed Feb. 18, 2003)

Before JONES, SMITH, and SILER*, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jerry Smith
United States Circuit Judge

REHC-6a

* Judge of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

Supreme Court, U.S.
FILED
JUN 16 2003
OFFICE OF THE CLERK

(2)

No. 02-1692

In The Supreme Court of the United States

KAREN MOORE, DERRICK K. NICHOLS, SHAWNYA FRANK, GEORGE JAMES, EUGENE PAGE, MARY ANN FRYE, AND LISA A. GREENE,

Petitioners,

v.

HANNON FOOD SERVICE, INC., HANNON'S FOOD SERVICE, INC., HANNON'S FOOD SERVICE OF JACKSON, INC., AND HANNON'S FOOD SERVICE OF NATCHEZ, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether the court of appeals correctly held that on the facts of this case the window of correction provision of the Fair Labor Standards Act regulation, 29 C.F.R. § 541.118(a)(6), unambiguously allows an employer to correct a deduction timing error and maintain the overtime exempt status of managers, in view of this Court's holding in *Auer v. Robbins*, 519 U.S. 452 (1997) that "the plain language of the regulation sets out 'inadverten[ce]' and 'made for reasons other than lack of work' as *alternative* grounds permitting corrective action." 519 U.S. at 463 (emphasis in original).

CORPORATE DISCLOSURE STATEMENT

Hannon's Food Service, Inc.; Hannon's Food Service of Jackson, Inc.; and Hannon's Food Service of Natchez, Inc. are privately held Mississippi corporations. No shares are owned by parent or publicly held companies.

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THIS CASE DOES NOT MEET THIS COURT'S STANDARDS FOR DISCRETIONARY REVIEW BY WRIT OF CERTIORARI.

29 C.F.R. § 541.118(a)(6) unambiguously permits correction by employers who erroneously make deductions from employees' pay for any reason other than lack of work. Employers retain the exempt status of those employees by promising to comply with the Fair Labor Standards Act in the future and repaying the employees for the deductions.

For a period of four months, this employer erroneously deducted cash register shortages totaling $474.87 from its managers' weekly salaries (which is not permitted by the FLSA) rather than deducting the shortages from the managers' monthly bonuses (which is permitted). After learning it was not allowed to make the deductions weekly, the employer resumed compliance with the FLSA.

The facts of this case fall squarely within the regulation as previously examined by this Court in *Auer v. Robbins*, 519 U.S. 452 (1997). "What we have here is an intensely fact-specific case in which the court below unquestionably applied the correct rule of law and did not unquestionably err—precisely the type of case in which [this Court is] *most* inclined to deny certiorari." *Kyles v. Whitley*, 514 U.S. 419, 460 (1995) (Scalia, J., dissenting; emphasis in original). The same must be said of this case. The law is clear. The facts are unique. Certiorari should be denied.

THIS FACT-SPECIFIC CASE DOES NOT WARRANT DISCRETIONARY REVIEW.

The window of correction regulation, 29 C.F.R. § 541.118(a)(6), begins with the statement that the effect of making impermissible deductions depends on the facts of each case. The specific facts of this case support the decision below allowing the correction.

In this case, the managers never lost any money which would not have been lawfully deducted from their pay anyway. The money was merely deducted sooner—from weekly salaries (which the FLSA does not permit) rather than from monthly bonuses (which the FLSA does permit).

Hannon, the employer, utilized this erroneous deduction timing for only four months. It discontinued this method when counsel informed Hannon that deductions could be made from bonus but not salary. Before trial Hannon reimbursed the managers the erroneously deducted amounts. Nothing in the record supports any suggestion that Hannon knowingly violated the FLSA during the four months it mistakenly deducted shortages from salary rather than bonus.

The window of correction regulation provides that if improper deductions are inadvertently made or are made for reasons other than lack of work, the exemption is not lost if the employer reimburses the employee and promises to comply in the future. Hannon had been in compliance with the FLSA for years before the four-month period in dispute. Hannon resumed compliance immediately upon being informed by counsel that, strange as it may seem, making the deductions weekly rather than monthly would

make a difference. Hannon repaid the disputed amounts before trial.

No one contends Hannon made these deductions for more than four months; no one contends Hannon made any deductions for lack of work; no one contends the deductions from monthly bonus rather than weekly salary would have been improper; and no one contends Hannon knowingly violated the law. To characterize Hannon as having a "*policy and practice* of making impermissible deductions," Petition, at i. (emphasis in original), is to distort the stipulated facts upon which this case was decided below.

The petitioners apparently would make any employer ineligible for the window of correction because of a "policy and practice of making impermissible deductions" whenever that employer intentionally makes *any* deduction more than once, regardless of the duration or the amount of the deductions, and regardless of whether the "impermissible" deductions become "permissible" when made monthly rather than weekly.

The peculiar facts of this case do not require this Court to decide whether the Secretary's attempted superimposition in other cases, contrary to the notice and comment requirements of the Administrative Procedures Act, 5 U.S.C. § 553, of a general "policy and practice" restriction on the window of correction regulation, conflicts with the unambiguous wording of the regulation. The facts stipulated here show no "policy or practice" of FLSA violations by Hannon.

THIS COURT HAS PREVIOUSLY ADDRESSED THE ISSUES PRESENTED AND HAS NO REASON TO REVISIT THEM.

The FLSA regulations provide a window of correction for any deduction, other than deductions for lack of work, from an exempt employee's salary. The regulations provide no time deadline for employers to avail themselves of the window of correction. This court has already held no deadline applies. *Auer*, 519 U.S. at 463-64 ("[I]n petitioners' view, reimbursement must be made immediately upon the discovery that an improper deduction was made. The language of the regulation, however, does not address the timing of reimbursement, and the Secretary's *amicus* brief informs us that he does not interpret it to require immediate payment.")

In *Auer*, the employer still had not corrected the error by the time of the decision on appeal. In our case, in contrast, Hannon corrected the error before trial. The central issue in *Auer* was whether public employers could deduct from their employees' salaries for disciplinary infractions when such deductions clearly violate the no-docking rule of 29 C.F.R. § 541.118(a). This court concluded that, because the regulation makes no distinction between public and private employees, the Secretary's interpretation disallowing both public and private employers from making disciplinary deductions made sense.

An agency's sensible interpretations of its own ambiguous regulations are one thing; an agency's nonsensical interpretations of its own unambiguous regulations are quite another. An interpretation of even an ambiguous regulation which is "'plainly erroneous' or inconsistent with the regulation" carries no weight. *Auer*, 519 U.S. at 461. An interpretation of an unambiguous regulation carries

no weight because "interpretation" loses its raison d'etre in the absence of ambiguity. *Christensen v. Harris County*, 529 U.S. 576 at 587-88 (2000).

As this Court made clear in *Auer*, "[T]he plain language of the regulation sets out 'inadverten[ce]' and 'made for reasons other than lack of work' as *alternative* grounds for permitting corrective action." *Auer*, 519 U.S. at 463 (emphasis in original). No ambiguity can be found in this "plain language of the regulation." *Id.* To "interpret" the regulation to close the window whenever an employer "has an express policy and actual practice of making deductions forbidden by the salary basis regulations," Petition, at 7, is plainly erroneous and inconsistent with the regulation.

THE CONFLICT IN THE DECISIONS OF THE COURTS OF APPEALS DOES NOT WARRANT GRANTING CERTIORARI IN THIS CASE.

The decision below is not only correct, it is perfectly consistent with the plain wording of the regulation as interpreted by this Court. The petitioner's time-honored cry of a "conflict among the courts of appeals," Petition, at 15, does not warrant granting the petition in this case.

As the petitioners correctly state, "the court of appeals in the instant case, like the similar decisions in the Third and Eleventh Circuits, believed that rejection of the Secretary's decision was compelled by this Court's decision in *Auer*." Petition, at 19. Granting certiorari in some other case from one of the other "circuits . . . [which have] expressly [and clearly erroneously] approved the Secretary's interpretation," *id.* at 8, might be appropriate. Granting certiorari to review the Fifth Circuit's manifestly correct

decision in this case would be inappropriate. The Fifth Circuit's decision in this case properly found no ambiguity because this Court had already found none exists in "the plain language of the regulation [which] sets out 'inadverten[ce]' and 'made for reasons other than lack of work' as *alternative* grounds for permitting corrective action." 519 U.S. at 463.

CONCLUSION

Certiorari should be denied.

Respectfully submitted,

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In The
Supreme Court of the United States

KAREN MOORE, et al.,

Petitioners,

v.

HANNON FOOD SERVICE, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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Respondents do not deny that there is a conflict among the circuits regarding the meaning of the window of correction regulation. Respondents contend that certiorari should not be granted to review the Fifth Circuit's interpretation of the regulation because it is "manifestly correct." (Response to Petition, p. 5). Instead, they suggest, certiorari would be appropriate only to review a decision from one of the "clearly erroneou[s]" circuits which have approved the Secretary's interpretation of the Department of Labor regulation. (*Id.*).

Contrary to Respondents' suggestion, when such an inter-circuit conflict exists, the decision to grant a writ of certiorari does not depend upon, or require, a predetermination by this Court of which circuits are "correct" and which are in "erro[r]." The Respondents' contention assumes that the Court, prior to granting certiorari, would decide the merits of the Question Presented. Obviously, the Court's practice is to the contrary.

Respondents assert that the repeated improper deductions in this case did not constitute a "policy or practice," and thus could be corrected even under the Secretary's interpretation of the window of correction regulation. (Response to Petition, pp. 1-3). Both courts below concluded otherwise. The district court opinion held:

> [T]he court concludes that the defendants during the four-month period . . . had an actual *practice* of making improper deductions as well as an employment *policy* that created a substantial likelihood that such deductions would occur. . . . [T] he window of correction . . . cannot be used to remedy a practice or policy of improper deductions.

> The court . . . concludes that the defendants' *admitted policy* . . . constituted a *policy or practice* of improper deductions.

(Petition, App. 29) (Emphasis added).[1]

The court of appeals characterized the events in this case in similar terms.

> Th[e] new *practice* resulted in a total of seventeen deductions. . . . Hannon made its legal counsel aware of the *policy* in February 1998, and counsel prepared a memorandum advising Hannon to discontinue the *practice*.

(Petition, App. 2-3) (Emphasis added). Respondents' contention that its conduct was not a "policy or practice" could not even provide an alternative basis for affirmance, because Respondents did not advance this argument in the court below.

The regulation at issue in this case may be amended in a manner that would resolve the instant litigation. Several months after the decision of the court of appeals, the Labor Department proposed a general revision of the regulations which define and limit the exemptions for executive, administrative and professional employees. (68 Fed. Reg. 15560;

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[1] Similarly, the district court opinion held:

> [T]he defendants had an actual *practice* of making improper deductions. . . . [T]here can be no doubt that the defendants had an actual *practice* of making improper deductions. . . . The defendants themselves admit that KFC management made a *policy* decision to begin deducting the amounts. . . . [T]he *policy* of making deductions for cash shortages from the managers' weekly salaries was clear and particularized.

(Petition, App. 25-26) (Emphasis added).

also available at www.dol.gov/_sec/media/speeches/541 Handout.htm). Proposed section 541.603(a) of the new regulation would effectively codify the Secretary's long-standing interpretation of the window of correction regulation.

> An employer who makes improper deductions from salary shall lose the exemption if the facts demonstrate that the employer has a *pattern and practice* of not paying employees on a salary basis. A pattern and practice of making improper deductions demonstrates that the employer did not intend to pay employees in the job classification on a salary basis. Improper deductions that are isolated or inadvertent, however, will not result in loss of the exemption.

(68 Fed. Reg. 15594) (Emphasis added). Similarly, section 541.603(b) would provide that "If the facts demonstrate that the employer has a *policy* of not paying on a salary basis, the exemption is lost." (*Id.*).

If the Secretary were to adopt a new regulation with this (or comparable) language, the appropriate disposition of the instant petition would be to grant certiorari, to vacate the decision below, and to remand the case for further consideration in light of that new regulation. *See e.g.*, *Raquel v. Education Management Corp.*, 531 U.S. 952 (2000) (certiorari granted, decision vacated and remanded for reconsideration in light, inter alia, of the Copyright Office's Statement of Policy published in the Federal Register); *INS v. Elramly*, 518 U.S. 1051 (1996) (decision vacated and case remanded for reconsideration in light of intervening enactment of the Antiterrorism and Effective Death Penalty Act of 1996). If, on the other hand, such a

new regulation is not adopted, then certiorari should be granted and the case decided by the Court on its merits.

As the instant brief is being filed in early July, 2003, it is not possible to know what action the Secretary will take on this proposal. The comment period with regard to this general revision of the FLSA regulations closed on June 30, 2003. (68 Fed. Reg. 15560). The revision as a whole has provoked considerable controversy; a number of opponents have objected, asserting that other portions of the proposal would withdraw overtime rights from several million workers protected by the current version of the FLSA regulations.[2] At this time the outcome of the controversy is impossible to predict.

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[2] *See, e.g.*, Statement of the AFL-CIO, June 26, 2003 (available at http://aflcio.org/yourjobeconomy/overtime pay); Statement of the National Organization for Women, June 12, 2003 (available at http://www.now.org/issues/economic/061203.dol.html). *See also New York Times*, July 1, 2003, page A19, col. 3 ("Democrats Protest Changes to Overtime Rules").

Accordingly, Petitioners will, no later than September 15, 2003, file with the Court a supplemental brief setting forth what action (if any) the Secretary of Labor has taken during the two and one half months following the end of the comment period.

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